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TAGS: AORC EINV ETRD UNCITRAL AU UN
SUBJECT: MEETING OF UNCITRAL WORKING GROUP ON ARBITRATION - REVISION OF THE UNCITRAL ARIBITRATION RULES

REF: USUN 0194

¶1. Summary. The UN Commission on International Trade Law (UNCITRAL) Working Group II (on Arbitration) continues its revision of the 1976 UNCITRAL Arbitration Rules. The Working Group (WG), which had completed a second reading of Articles 1-26 at prior sessions, met in Vienna September 14-18, 2009, and continued the second reading, reaching Article 40 (there are 41 articles in the existing Rules), but unresolved issues remain. The WG agreed to retain the majority rule for decision-making by three-arbitrator tribunals. It also retained the characterization of awards as "final and binding." It determined that accepting arbitration under the Rules constitutes a waiver of rights of appeal, review or recourse regarding an award except for applications for set-aside, and, in this connection, the Report of the working session stated that this provision would not implicate a party's right to raise grounds for non-enforcement of an award pursuant to the New York Convention. It was agreed that, where parties fail to designate the applicable substantive law, the tribunal may apply the law that it determines to be appropriate. Language remains to be worked out relating to default (failure to submit a statement of claim); waiver of the right to object to non-compliance with the Rules or the arbitration agreement; and a new possibility of seeking an award after issuance of a termination order. A number of unresolved issues also remain relating to costs. The WG will convene again in February with the goal of completing a text for referral to the UNCITRAL Commission for consideration at its annual meeting next summer. End summary.

¶2. The WG was attended by representatives of UNCITRAL member states and other UN member states as well as observers from a number of governmental or private organizations. The U.S. delegation included a representative of the Legal Adviser's Office and two private advisers.

Issues Resolved...

¶3. Three principal issues were resolved by the WG in this session.

¶4. Decision-making by the tribunal (Article 31): The issue was whether to retain the existing rule, whereby when there are three arbitrators, decisions must be made by a majority. The proposed alternatives were variants of the rule that has been adopted by a number of arbitral institutions (e.g., the ICC and LCIA), whereby if the arbitrators cannot reach a majority, the decision shall be made by the presiding arbitrator alone. Differing views were expressed regarding the frequency with which such situations arise; the incentives that either formula would provide to arbitrators to reach agreement; the credibility of awards under each approach; and the risk of a presiding arbitrator acting arbitrarily. There were numerous proponents of the approach of providing for a decision by the presiding arbitrator where there was no majority, but also

significant support (including from the U.S.) for keeping the majority rule. As the Chair did not find general consensus in favor of change, the existing rule was retained. It was emphasized, however, that in cases where the arbitrators are having difficulty reaching a majority, the parties have the ability to agree to give the decision-making authority to the presiding arbitrator, or to choose some other method of deciding.

¶5. Form and effect of an award (Article 32): There were two main issues here. The first was whether to retain language stating that awards are "final and binding." It was suggested that the meaning of "final" was ambiguous, and that different types of awards (e.g., interim, partial) might not have the same "final and binding" character. In response, it was observed that "final and binding" was found in many arbitration rules and had not created problems in practice. It was decided to retain that phrase, as the U.S. delegation favored. The second issue concerned how to express the concept that parties, in accepting arbitration under the Rules, thereby waive certain rights of appeal, review or recourse regarding an award. Language to that effect was agreed that expressly excludes from the waiver applications for setting aside an award. It was also understood in the WG that such waiver does not encompass actions to resist recognition or enforcement of an award, for example on the basis of the grounds set forth in the New York Convention.

¶6. Applicable law (Article 33): The question was what the default choice of law rule should be for the tribunal to apply where the parties fail to designate the applicable law governing the substance of the dispute: (1) the law with which the case has the closest connection, or (2) the law that the tribunal determines to be

appropriate. There was broad support for the latter, as it was seen as desirable to give the tribunal flexibility in this regard, and the second alternative was adopted.

...But Unresolved
Issues Remain

¶7. Nevertheless, a number of issues discussed during this session remain unresolved.

¶8. Default (Article 28): The current text under review provides that, where a claimant has failed to communicate its statement of claim, the tribunal shall issue an order for termination of the proceedings unless the respondent has submitted a counterclaim. Concerns were expressed that this was too limiting, and did not take into account other circumstances in which issues in dispute - such as a request for an award on costs - might still require a decision by the tribunal. The Secretariat was asked to draft new language, for review at the next session, to provide the tribunal with more flexibility.

¶9. Waiver of right to object (Article 30): The current text of the Rules states that, where a party knows that any provision of the Rules has not been complied with yet proceeds with the arbitration without stating its objection without undue delay, it shall be deemed to have waived its right to object. A number of delegations said that proving actual knowledge was too difficult a standard to meet, and suggested instead that the standard should be "knew or should have known." Others were concerned that such a standard might be difficult to apply in practice, as the circumstances could vary widely in terms of, e.g., the sophistication of the parties or their counsel. A majority of delegates provisionally favored a standard such as that the failure to object was "justifiable" and the Secretariat will seek to set forth a workable standard along those lines in new language.

¶10. Additional award (Article 37): The current text contemplates a situation where a party, after receiving the initial award, requests that the tribunal make an additional award as to omitted claims. A concern was raised that situations may also arise in which a party may feel that claims have been omitted (e.g., for costs) after a

termination order has been issued. There was general support for applying Article 37 in those circumstances, but the best means of doing so was not resolved. Bracketed alternatives will be considered at the next WG meeting.

¶11. Costs (Articles 38-40): These articles were discussed but a number of unresolved issues remain. One question identified is how the tribunal should communicate to the parties its fees and the manner in which they were computed. Another is whether the tribunal's statement of costs (the quantitative total, and not their allocation between the parties) should be included in the award or addressed separately. A remaining question not addressed at the latest session is whether the tribunal should be permitted to charge the parties for costs associated with issuing an interpretation to an award, a correction to an award, or an additional award.

Next Steps

¶12. The WG will next meet for a week in February 2010, with the objective of completing a text that can then be submitted to the UNCITRAL Commission for consideration at its annual meeting next summer. In order to achieve this, the WG will need to work efficiently; in addition to completing its second reading through Article 41 and dealing with the pending issues identified above in Articles 28-40, there remain a number of still unresolved issues in earlier articles.

DAVIES